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AGE DISCRIMINATION IN FACULTY EMPLOYMENT

By Stuart H. Bompey

Editor's Note: At the Thirteenth Annual Conference, we asked Stuart Bompey of the law firm of Baer, Marks & Upham to present a legal update of discrimination issues and their effect on collective bargaining. As part of his paper, Mr. Bompey discussed the problem of age discrimination. We believe that this issue, one that is in the forefront of the employment relationship, is so significant that we asked him to update his remarks for publication in this Newsletter. As Mr. Bompey graciously agreed, set forth below is the "Age Discrimination" section from his earlier presentation. It should be noted that this portion of his paper has not previously appeared in print. We acknowledge his contribution to the National Center.

AGE DISCRIMINATION IN EMPLOYMENT ACT

Review of the demographics of most faculty members of colleges and universities, as well as administrative and staff personnel, indicates that age discrimination and potential issues under the Age Discrimination in Employment Act (ADEA) have come center stage, on the litigation front as well as in collective bargaining. With the elimination of mandatory retirement in some 21 states, colleges and universities are presented with issues involving voluntary retirement programs and productivity requirements that do not violate the prohibitions against age discrimination. In addition, the Equal Employment Opportunity Commission is currently in the process of reviewing the issue of post-normal retirement accrual of benefits under retirement programs. A proper understanding of the issues is essential when one approaches collective bargaining or policy determinations in this area.

The Age Discrimination in Employment Act currently provides that individuals may be mandatorily retired at age 70. However, states such as New Jersey, New York and California have enacted legislation which prohibit mandatory retirement at any age. It is well recognized that where a state statute in the discrimination area encompasses a broader prohibition than the Federal statute, or vice versa, the statute requiring the broadest application will be applied. Although the New York statute provides for an exception for tenured faculty members, its impact will be felt at the collective bargaining table involving both tenured and non-tenured faculty as well as collective bargaining with staff and administrative personnel.

VOLUNTARY EARLY RETIREMENT PROGRAMS

Most recently, employers have explored the possibility of instituting voluntary early retirement and separation incentive programs in an attempt to induce employees to voluntarily retire prior to normal retirement age. Thus, the recently concluded negotiations between Fairleigh Dickinson University and the Fairleigh Dickinson University Chapter of the American Association of University Professors provided for such a program. The Fairleigh Dickinson plan provided that faculty members, who voluntarily resigned from employment at the University 45 days after the ratification of the collective bargaining agreement, would receive 1.6 times one year's salary. The faculty members who voluntarily resigned within 60 days after ratification would receive 1.4 times one year's salary. Similar programs have been instituted at other companies and institutions, basing "buy-out offers" on age and length of service.

Under the Age Discrimination in Employment Act, such programs must be voluntary. If there is a suggestion that the program is in any way mandatory for employees under age 70 or that employees were coerced into accepting the program, such programs would violate the Federal prohibition on mandatory retirement. In Toussaint v. Ford Motor Co., 581 F.2d 812 (10th Cir. 1978), the Tenth Circuit examined a "special early retirement" program instituted by the Ford Motor Company. In that case, the Tenth Circuit characterized the Ford plan as effectively a

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voluntary retirement program and found no evidence of any coercion and, thus, found that the program did not violate the Age Discrimination in Employment Act. Similarly, in Fellows v. Medford Corp., 16 FEP Cases 764 (D. Oregon 1978), the Federal District Court found that employees had not been threatened with a choice between voluntary and involuntary early retirement and that the acceptance of the program was purely voluntary by the employees in question. A similar result was reached in Ackerman v. Diamond Shamrock Corp., 670 F.2d 66 (6th Cir. 1982), wherein the Sixth Circuit adopted the employer's arguments that the employee involved had voluntarily resigned from employment. Evidence that the program was voluntary included an agreement signed by the employee indicating that acceptance of the special early retirement program was "of his own free will."

It is also significant to note that the courts, in approving such programs under the Age Discrimination in Employment Act, have examined the reasons for the program and where the employer has instituted such programs on the basis of valid business considerations, the program stands a far greater likelihood of successful scrutiny under the ADEA.[1]

ADEA AMENDMENTS: AGE 65-70

In addition to early retirement programs, two major changes in the regulations under the Age in Discrimination in Employment Act should be noted. First, effective October 9, 1984, the level of retirement income exempting high level policy executives, age 65-70, from the ADEA's protection was raised from $27,000 to $44,000. As you are aware, the ADEA allows employers to voluntarily retire individuals beyond age 65 if they are in an executive or high policy level position, provided that their retirement income equals $44,000 per year. The other major regulatory change will occur in the accrual of benefits for individuals who remain employed past the normal retirement age under the employer's retirement plan.

The Age Discrimination in Employment Act was amended in 1978 to prohibit mandatory retirement of individuals prior to the age of 70, except for certain high policy level positions and a limited exception for tenured faculty members for a limited period of time. With the amendment of the statute, it was made clear that existing pension plans would not be altered nor was it the intent of Congress to place additional financial burdens on institutions for continuing to employ individuals beyond normal retirement age, usually 65.

Immediately after the passage of the statute, the Department of Labor issued an interpretive bulletin which permitted employers to refuse to accrue additional benefits for employees beyond age 65 and to refuse to credit service for pension purposes beyond normal retirement age, should such individuals continue to be employed beyond normal retirement age. Indeed, Congress, in passing the amendments to the Age Discrimination in Employment Act, increasing the upper age limit from 65 to 70, specifically noted that:

> normal retirement age is the age at which a worker receives full benefits, that is, benefits that are not actuarially reduced on account of early retirement. This bill would not change the definition of normal retirement age. These amendments do not require any additional benefits, benefit accruals or actuarial adjustments to be provided other than those required under ERISA.

As further clarification of the intent of both the Department of Labor and Congress, Donald Ellisburg, the then Assistant Secretary of Labor for Employment Standards, issued a letter to Congress which stated that:

> an increase in the upper age limit of ADEA, would not increase the funding costs for private pension plans. As a matter of fact, financial pressures and private pension plans could be elevated. Requiring an employer to permit a qualified employee to work until the upper age limit, regardless of the pension plan's normal retirement age, would result in cost savings to plans rather than increases. As an actuarial matter, the longer an employee works, the shorter the period retirement payments will have to be made, thus, lowering the funding assumptions of the plan. Savings would, of course, come from the added years of accumulated interest on the Fund. Savings would also stem from the fact that, as indicated above, the plan need not provide for further accrual of benefits after the participant has reached the plan's normal retirement age and, thus, the added years of service do not increase the ultimate retirement benefits or the cost of providing it.

Finally, with the transfer of enforcement of the Age Discrimination in Employment Act from the Department of Labor to the Equal Opportunity Commission, the EEOC adopted, by implication, the Department of Labor's interpreted bulletin on the accrual of benefits for individuals who remain past normal retirement age.

E.E.O.C. PROPOSED REGULATIONS

On March 5, 1985, the Equal Employment Opportunity Commission approved a notice of proposed regulations that would replace some of the Age Discrimination in Employment Act's interpretations issued by the U. S. Department of Labor. Specifically, the EEOC proposed regulations would replace the Department of Labor's special rules allowing employers to discontinue pension crediting and contributions for employees who work

beyond normal retirement age. The specific changes would include the following:

1. Under the Department of Labor interpretive bulletin, employers contributing to a defined contribution plan may refuse to make contributions on behalf of individuals hired after normal retirement age, and may exclude individuals on the basis of age from defined benefit plans. Under the proposed rules, employers would be prohibited from excluding individuals on the basis of age from defined contribution plans or defined benefit plans which have no specific normal retirement age.

2. The current Department of Labor interpretive bulletin prohibits the exclusion of individuals hired more than five years before normal retirement age from defined benefit plans. The proposed regulations would modify this rule to forbid the exclusion of individuals hired before age 60 from defined benefit plans.

3. Under the current regulations, an employer may exclude individuals who are hired less than five years before normal retirement age from defined benefit plans. Under the proposed rules, employers may only exclude individuals hired after their sixtieth birthday from such plans.

4. Under the Department of Labor interpretive bulletin, employers may cease contributions to non-supplemental defined contribution plans for post-normal retirement age employees. Under the proposed rules, employers may not suspend contributions to defined contribution plans for post-normal retirement age service.

5. The current Department of Labor regulations do not require either a recalculation of the normal retirement benefit for service occurring after normal retirement age, or an actuarial equivalent of normal retirement benefits available for individuals retiring later than normal retirement. The proposed regulations would require a recalculation of normal retirement benefits to include years of service (up to the maximum specified by the plan), salary increases and benefit improvements which occurred after an individual's normal retirement age, with respect to all employees retiring later than normal retirement age.

Obviously, if adopted, the EEOC's proposed regulations would have a significant impact on the collective bargaining process as well as a significant financial impact on most colleges and universities. Thus, according to TIAA-CREF, more than 30% of participating colleges and universities do not contribute for individuals who continue to be employed beyond normal retirement age. In view of the cost implications associated with the regulations, a prediction as to their eventual enactment can only be speculative.

"WILLFUL" VIOLATION OF ADEA

The final issue in the age discrimination area that should be noted is the Supreme Court's decision in Trans World Airlines, Inc. v. Thurston, ___ U.S. ___, 105 S. Ct. 613 (1985). The major issue presented in Thurston was the proof required to establish a "willful" violation of the ADEA within the meaning of Section 7(b) of the Act. Significantly, the Supreme Court adopted the Court of Appeals' standards for a willful violation by finding that one must establish that the employer knew that it was violating the Age Discrimination in Employment Act or showed reckless disregard of whether its conduct was prohibited by the ADEA, in order to establish a willful violation.[2] Holding that the plaintiffs had failed to meet this burden, the Court relied upon its finding that TWA officials acted reasonably and in good faith in attempting to determine whether their plan had violated the Act. The Court's finding of good faith included the fact that TWA was not advised by counsel that its policy discriminated against employees on the basis of age. Thus, the Supreme Court in Thurston has severely limited the ability of plaintiffs to obtain liquidated damages under the willful violation standards of the ADEA.[3]

SUMMARY

An analysis of the foregoing clearly establishes the significance and the impact of employment litigation issues on the collective bargaining process. Not only should the negotiator review existing collective bargaining agreements and the impact of recent decisions on existing provisions, but the negotiator must be mindful of these decisions when negotiating subsequent agreements. Federal and state antidiscrimination statutes affect every employment decision made by a college and university and have become essential ingredients in the collective bargaining process.

FOOTNOTES

1. See also Nolan v. Otis Elevator Co., 102 N.J. 30, 505 A.D.2d 580 (1986), wherein the Supreme Court of the State of New Jersey found that ERISA preempted a challenge to a voluntary early retirement program by younger employees, where the program required age 55 with 25 years of eligible service in order to receive benefits under the program. See also Dorsch v. L. B. Foster Co., 39 Empl. Prac. Dec. (CCH) § 35, 887 (7th Circuit 1986), in which the Seventh Circuit rejected a challenge to an early retirement plan under the Age Discrimination in Employment Act and based on the allegation that the plan was discriminatory in favor of younger employees because such employees would ultimately receive larger payments than older employees.

2. Subsequent cases interpreting the Trans World standard include Wilhelm v. Blue Bell, Inc., 773 F.2d 1429, 1435 (4th Cir. 1985) (jury instruction explaining that conduct is willful "when it is done intentionally, knowingly, with the intention to accomplish the result of firing and with awareness on the part of the actor that the conduct is covered by

the Age Law" ran afoul of Trans World, since such instruction is too expansive and "would result in an award of double damages in nearly every case."); Whitfield v. City of Knoxville, 756 F.2d 455 (6th Cir. 1985) (Sixth Circuit's prior ruling that an employer's protestations of good faith are irrelevant in determining willful conduct is overruled by Trans World).

3. A question left open by Trans World is whether its interpretation of "willfullness" for liquidated damages purposes should be applied to determine the appropriate statute of limitations. The ADEA (as well as the Fair Labor Standards Act) incorporates the statute of limitations of the Portal-to-Portal Act of 1947, 29 U.S.C. §255(a) (PPA), which provides for a two-year limitations period unless the violation is willful, in which case the limitations period is extended to three years. The Court of Appeals have reached different conclusions as to whether Congress intended the "willfullness" standard to be identical for determining liquidated damages and for purposes of the limitations period. The Supreme Court, acknowledging this split of opinion, refused to resolve the conflict. Trans World, 105 S. Ct. at 625 n. 21. Lower courts have remained divided on this issue. See, e.g., EEOC v. McCarthy, 768 F.2d 1 (1st Cir. 1985) (standard for determining "willfullness" for limitations purposes is whether the employer knew or had reason to know that the Fair Labor Standards Act was applicable to its employment practices; Trans World holding Borough of Brentwood, 603 F. Supp. 1298 (W.D. Pa. 1985) (standard for determining willfullness under ADEA for purposes of liquidated damages and for determining appropriate statute of limitations should be uniform).

STATISTICAL PROOF IN SEX DISCRIMINATION LITIGATION

By Esther Liebert

Editor's Note: Esther Liebert is the Director of Personnel at Baruch College, CUNY and serves as a member of the National Center's Advisory Committee. She is interested in discrimination issues in employment and has conducted research in the area. In conjunction with her position, she has developed both a theoretical and practical approach to the problem.

INTRODUCTION

In recent class action suits involving sex discrimination in higher education, the parties have made use of statistical evidence to convince the court of their positions. In one case, Melani v. Board of Higher Education of the City of New York[1] (now Board of Trustees of the City University of New York), the judge found that the plaintiffs had sufficient evidence to establish their claim on the basis of statistics and the defendants' failure to rebut this prima facie case led to an adverse decision.[2] In Coser v. Moore, a case which seemed similar fact pattern and in which the same plaintiffs' lawyer and statistician were employed—the judge found the analysis presented was inadequate to establish the case against the defendant. Reviewing the similarities and differences in these cases and in the way they were handled will provide helpful insights to anyone interested in individual or class action suits involving statistics in litigating sex discrimination claims in higher education.

Federal Legislation

Title VII is the statute most frequently cited in allegations of sex discrimination. The plaintiff bears the burden of persuasion for the case as a whole. A case may be made for either or both adverse impact or disparate treatment. To demonstrate adverse impact, the plaintiff need only show "that the outcomes of the employment procedures were at significant variance with the demographic characteristics of the applicant pool or relevant labor force."[3] Statistical evidence alone can establish a prima facie case and the burden shifts to the employer. To rebut, the defendant may show that the plaintiffs' proof is inaccurate or insignificant, that the criterion which has a discriminatory impact is job related, or that the pattern is a product of conduct occurring before the act applied to defendants. Plaintiffs may counter that the reason given is in fact a coverup.

In McDonnell Douglas Corp. v. Green, the Supreme Court established four standards to be met by a plaintiff in establishing a prima facie case of disparate treatment:

1. membership in a protected group
2. qualification for the job in question
3. nonselection by the defendant
4. that others with plaintiffs' qualifications, but nonmembers of the same protected group, were thereafter sought.[4]

The defendant may respond by providing a legitimate, nondiscriminatory reason for the action and the plaintiff may attack that reason as a pretext for the defendant's true discriminatory motive.[5] Again, the burden of persuasion rests with the plaintiff.

SOME STATISTICAL CONSIDERATIONS

The applicability of statistical data must always be carefully evaluated. For example, since the number of PhD's awarded to women has grown so

rapidly, it would be misleading to use data concerning recent female PhD's to establish the size of the labor pool or in determining the pool for senior faculty positions. Also, availability of women PhD's is lower than the data would indicate for two reasons: married female PhD's have more limited choices since they tend to follow their husbands' careers and not all PhD recipients want to be college teachers.[6] Of course, the latter holds true for men as well.

Differences in salary between men and women cannot adequately be explained by an examination of a limited number of factors, e.g. degree and years of experience. The variables considered to be the best predictors of salary are rank, discipline, marital status, degree, prestige of the conferring institution, years of experience, age, publications and involvement in teaching, administration, or research.[7] Some of these merit comment.

If the court has found discrimination in hiring or promotion, it will not permit the defendant to employ rank as a variable since it reflects rather than explains discrimination.[8]

It may not always be possible to analyze data on the basis of all disciplines in the institution if the sample size becomes too small.

A controversial belief is that marriage enhances men's careers, but has the opposite effect on women. The hypothesis is that women undertake family responsibilities and move in and out of their careers. It has been suggested that if this concept is tested empirically, it could explain why studies which have not taken marital status into account have shown a significant unexplained gap in earnings (10%-15%) after other factors were controlled.[9]

The use of age as being equivalent to years of experience overstates apparent discrimination since women generally earn their degrees later than men.[10]

When counting experience, actual rather than potential experience should be used. Potential experience measures the number of years since attainment of the degree. To the extent that women move in and out of the labor market, their potential experience will be inflated and use of this criterion, rather than actual years, will overstate the extent of discrimination.

Articles may be counted or the number of times the articles are cited by others may be counted. Neither one of these approaches yields a true score for a person's scholarly work, and any attempt to evaluate it subjectively for a statistical analysis of substantial size would be impossible.

Studies show that women publish significantly less than men. Females participate more in teaching, which pays less well, and less in research or administration, which pay better.[11]

The effect that these variables, the independent variables, have on a dependent variable, salary, may be measured by means of multiple regression analysis, a statistical measure of great importance in sex discrimination litigation. When the statistician has completed his explanation of why male and female salaries differ on the basis of these independent variables any remaining difference in salary is "unexplained." If the difference is high enough, statistically significant, the court may conclude that the "explanation" is discriminatory treatment. In order to present the best case possible, each side will argue for the use of variables which it feels best presents its position. This was a critical factor in the Melani case described below.

The use of statistical proof in salary discrimination cases has become a routine matter. The courts increasingly require defendants to counter plaintiffs' evidence by demonstrating that the plaintiffs' analysis was faulty or by using an alternative model.[12]

The following brief case summaries are presented as examples of sex discrimination litigation in higher education which rely heavily on statistical presentations. They illustrate some of the problems which can be encountered in such cases.

Melani v. Board of Higher Education

On March 17, 1983, Judge Lee Gagliardi took the first step in bringing to a close a class action suit brought under Title VII by a group of instructional staff women in December of 1973. The litigation had had a stormy history. Judge Gagliardi had urged the parties to settle the matter out of court but a settlement was out of reach and in 1980, a trial was held on the limited issue of salary discrimination.

The plaintiffs alleged that City University engaged in systematic discrimination against women. In order to prove intentional discrimination, the plaintiffs relied almost exclusively on statistical studies. Their analyses demonstrated a statistically significant salary differential of $1,600 between male and female faculty members and that female faculty members were underrepresented in higher ranks.

The strength of the plaintiffs statistical presentation was such that CUNY was put on the defensive.

CUNY argued that the plaintiffs could not rely exclusively on statistics to demonstrate discriminatory motive. Judge Gagliardi said, however, that the Supreme Court had held that gross statistical disparities may alone constitute prima facie proof of a discriminatory intent.[13] CUNY went on to attack the plaintiffs' analytic methodology on a number of specific points.

The Court found that the plaintiff had established a prima facie case of sex-based salary discrimination. CUNY was unable to sufficiently challenge the plaintiffs' statistical analysis.

Coser v. Moore

This was a class action suit under Title VII brought by a group of female faculty and non-teaching professionals (NTP) currently and formerly employed. The plaintiffs asserted that the State University of New York atStony Brook engaged in practices and policies, which though they appeared to be neutral, had a disparate impact on women. A number of issues were tried: hiring, placement at hire, promotion, tenure and salary. The case was decided in 1983.

As in Melani, the plaintiffs based their case largely on the results of statistical analysis. Judge Pratt criticized the probative value of the plaintiffs' data. His grasp of the differences among the training and qualifications required of university personnel led him to reject the plaintiffs' statistical proofs as ignoring these differences.

The defendant placed on the record considerable information concerning personnel practices and procedures, affirmative action policy and procedure and the structure of the university. The opinion makes clear that Judge Pratt relied, at least in part, on this information when he stated that the institution's practices and policies were designed to minimize the likelihood of discriminatory treatment. He also found that Stony Brook's affirmative action program was sensitive and responsive to the needs of the target populations.

The Circuit Court affirmed Judge Pratt's decision on appeal the following year. Judge Winter cited the defendants' showing that there was no significant salary disadvantage for women hired after 1972, a point on wich there was no dispute, and the non-discriminatory rate of salary increase for pre-1972 hires in every year after 1972. The statistical difference in average salaries was seen as a residual effect of the pre-1972 discrimination for which Stony Brook was not liable.[14]

CASE COMPARISONS

It would be difficult to conjure up two situations so apparently similar, with such different results. The issues were the same. The plaintiffs' counsel and statistician were the same. How can we explain the very different outcomes? In fact, the cases and the way they were handled vary significantly.

The attitudes of the judges toward the use of statistics to prove allegations of sex discrimination varied substantially. Judge Pratt was cautious from the start. Then, when he had to choose one side's position over the other in deciding upon the correct way to conduct a specific study, he uniformly supported the defendant. Judge Gagliardi found reason to give his support to the plaintiffs. Frequently, the disputed statistical practices were identical as seen in Table 1 below:

Table 1

Statistical Practices Used by College Administrators in Melani and Coser

Variables in Statistical Analysis	Melani v. CUNY	Coser v. Moore
Prior experience	No	Yes
Experience at CUNY	No	—
Experience at Stony Brook	—	Yes
Analysis by department	No	Yes
Rank	No	Yes
Inclusion of NTP with faculty	Yes	No*
Grouping all NTP together	Yes	No

*Plaintiffs' counsel changed its position and presented its arguments for NTP separately in Coser v. Moore.

In Melani, the University did not have sufficient expert help and to counter the power of plaintiffs' statistical presentation. Plaintiffs' counsel, came in with an impressive statistical presentation, a convincing expert witness and data designed to prevent the University from using rank as a variable in its analysis. The defendants in Coser v. Moore succeeded in providing the judge with a substantial amount of material favorable to the school's position and from time to time, he relied upon it to set aside a not too convincing argument from plaintiffs. In contrast, Judge Gagliardi questioned the probative value in the testimony of CUNY's witnesses.

SUMMARY AND CONCLUSIONS

From the preceding discussion, we may conclude that the statistical analysis to prove the presence or absence of sex discrimination should be put together in as thorough a method as possible. The presentation should be strong and therefore, convincing. This is at the heart of the case for influencing the outcome one way or the other. The following are among the specific points which should be addressed:

1. Exclude data prior to Title VII's 1972 effective date.

2. Perform a multiple regression analysis including such independent variables as academic degrees, age, years of University service, quality of academic degree, certificates and credentials and time elapsed since completion of each degree.

3. Present rank as either a justification for differences in pay or as an indication of discimination depending upon your position.

4. Decide whether or not to combine the salaries of faculty and non-teaching professionals.

5. Consider as independent variables: publication, total years of teaching experience, quality of teaching, committee work and community service. The Court in the CUNY case ruled that these post-hire variables "may incorporate the effects of discriminatory decisions rather than provide an independent measure of...productivity."[15]

6. The following independent variables may also be important; a) placement on hire, b) prior faculty rank and experience, and proper consideration of varying positions long held by NTP's.

7. The current institution may be adjudged not to be responsible for placement at hire based on past discrimination.

It seems clear that the use of discrimination litigation will inevitably grow. The plaintiffs' counsel will need to:

> present significant discrepancies...and also anticipate those productivity-related factors upon which defendant might predictably rely and enter them into an accompanying regression analysis showing that sexually significant differences still remain. Plaintiff thus makes out her prima facie case, establishes the anticipated factors to be pretextual, and satisfies her burdens of production and proof in a single thrust.[16]

As we have seen, the defendant's response must be at least equally as effective in order to prevail.

FOOTNOTES

1 Lilia Melani, et al., v. Board of Higher Education of the City of New York, 73 Civ. 5434, March 17, 1983.

2 Id., at 25.

3 Donald R. Stacy and Clarence L. Holland, Jr., "Legal and Statistical Problems in Litigating Sex Discrimination Claims in Higher Education," The Journal of College and University Law. (Washington, D.C.: The National Association of College and University Attorneys and the West Virginia University School of Law, Fall, 1984), 114.

4 Id., 115.

5 Id., 115.

6 Id., 120.

7 Id., 133.

8 Id., 136.

9 Id., 134. This conclusion is based upon a 1969 study The Woman Doctorate in America by H. Astin. I believe that a current study would show that the difference has been substantially diminished.

10 Id., 135.

11 Id., 135.

12 Id., 116.

13 Melani, at 11.

14 Coser v. Moore, U.S. Court of Appeals, Second Circuit, Docket No. 83-7767, July 3, 1984, at 15 and 16.

15 Melani, at 14.

16 Stacy and Holland, 116.

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